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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1480

BENJAMIN RODRIQUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

BENJAMIN RODRIQUEZ,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Benjamin Rodriguez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 30, 1976.

OPINION BELOW

The opinion of the Court of Appeals, reported at 545 F.2d 829, appears in the Appendix hereto (App. 1a-6a). No opinion was rendered by the United States District Court for the Southern District of New York.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on November 30, 1976. A timely petition for rehearing was denied on March 25, 1977 and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's supplementary modified *Allen* instruction improperly curtailed the jury's legitimate factfinding function by divorcing it from considerations of fairness, invited the dereliction of its full responsibilities by pointing to appellate remedies, and placed undue pressure on the lone juror who prompted it by dwelling on the juror's supposed corruption of her oath in showing sensitivity to such intangibles as a fair trial.

2. Whether the federal courts generally should ban further use of the charge approved by this Court in *Allen* v. *United States* (and given in modified form herein) and substitute in its stead A.B.A. Trial by Jury Standard 5.4—as the District of Columbia, Third and Seventh Circuits have done; and, whether lower federal courts are authorized with supervisory power to alter such Supreme Court precedent.

3. Whether the trial court committed reversible error in violation of Supreme Court precedent, of Rule 43 of the Federal Rules of Criminal Procedure, and/or of petitioner's constitutional rights to be present and heard by counsel in open court at all stages of the proceedings when it disposed of the jury's third deadlock note by sending the jury word to continue deliberations without advising the defense of the note or seeking its views as to the appropriate judicial response.

4. Whether the prosecution's reference in final argument to petitioner's failure to contradict its only drug transaction witness and his failure to present evidence of where he hid his cash hoard naturally and necessarily highlighted in a critical fashion the fact that the petitioner exercised his constitutional and statutory rights not to testify.

5. Whether the prosecution's deliberate elicitation of the fact that an attorney for petitioner had invoked petitioner's attorney-client privilege before an investigating grand jury impermissibly burdened the attorney-client relationship; and, whether there was any legitimate justification for such prejudicial evidence.

6. Whether the prosecution improperly prejudiced petitioner by deliberately eliciting evidence of supposed criminal associations with "organized crime" and with a "numbers operator" which evidence was clearly unnecessary but freely admitted under the Second Circuit inclusionary rule for "other crimes" evidence.

7. Whether the trial court effectively amended the grand jury's limited and specific finding that the defendant had concealed income made in heroin transactions when it instructed the petit jury that it could return a finding of guilty even though it believed petitioner received no income from drug trafficking and thus bypassed petitioner's constitutional safeguard of a grand jury indictment in violation of *Stirone* v. *United States*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or the Militia, when in actual service in time of War or public danger; . . . nor shall be compelled in any criminal case to be witness against himself. . . .

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, by an impartial jury . . . , and to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defence.

United States Code, Title 18, Federal Rules of Criminal Procedure.

Rule 43(a):

> *Presence Required.*—The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. * * * *

United States Code, Title 28, Rules of Evidence For United States Court and Magistrates:

Rule 403:

> *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.*—Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b):

> *Other crimes, wrongs, or acts.*—Evidence of other crimes wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Preliminary Statement

A two-count indictment was founded against petitioner Rodriquez on April 14, 1974, charging him, in Count I, with attempting to evade income taxes for the year 1967 in violation of 26 U.S.C. § 7201 by omitting in his 1967 tax return income received "from the purchase and sale of heroin," and, similarly, in Count II, with submitting a false income tax return for the year 1967 in violation of 26 U.S.C. § 7206(1) by failing to report "additional income derived from another business, to wit, trafficking in heroin . . . ." Following his plea of not guilty, he was tried in the United States District Court for the Southern District of New York before the Honorable Robert L. Carter and a jury. A verdict of guilty was returned as to each count on March 2, 1976. On April 6, 1976, the Court entered judgment sentencing petitioner to two years' imprisonment on Count I and to no sentence on Count II on grounds that it was a lesser included offense.

On November 30, 1976, the Court of Appeals affirmed in a written opinion. On March 25, 1977, the Court of Appeals denied petitioner's timely petition for rehearing with suggestion for rehearing *en banc*.

The Indictment

An indictment was founded six years, to the day, after the April 15, 1968 filing deadline of petitioner's joint federal income tax return for the year 1967. The Grand Jury charged him basically with avoiding taxes by concealing income received in the alleged purchase and sale of heroin.

The Specific Item

The government called one informant witness, Claude Pastou, to prove this alleged drug trafficking (Tr. 918-1109). Pastou, who faced 1000 years' imprisonment in this Country alone (Tr. 976-81) and who admitted on cross-examination that he was in "an occupation in which one survives by the use of his wits" (Tr. 974-75), testified that during August, September and October 1967 he sold 58 kilograms of heroin at $11,000 per kilogram to the petitioner. A Drug Enforcement Administration agent testified as an expert that, in his opinion, during that time period quick middleman sale of such contraband would result in profit of 30 to 100 percent (Tr. 1159-1210). Additionally, there was some evidence presented circumstantially corroborating Pastou's testimony that he used a suitcase with a false bottom to transport heroin (Tr. 1110-58), that the petitioner owned a maroon Lincoln (Tr. 1300-01), that the petitioner had a son in a certain age range (approximately 5 to 7 years old in 1967) (Tr. 1226), and that

a court record corresponded to information Pastou received from a third party (the person he testified introduced him to the petitioner).

Expenditures Method Proof

Evidence was introduced by the government to show a financial starting point of roughly $1,000 of liquid assets in the petitioner's hands in September of 1966. The most direct evidence was a financial statement petitioner had filed with a New Jersey bank in the process of assuming a mortgage incident to the purchase of a home, although the government also tried to show circumstantially that the petitioner was short on money at this time. Additionally, the government proved that petitioner expended nearly $80,000 during the last months of 1967, primarily in making investments. His tax return for 1967 reported roughly $7,000 in income. And he also received some $5,000 from the repayment of a loan which is a nontaxable source.

Hoard of Assets

Pursuant to its expenditures method of proof the government, among other things, had the burden of disproving the existence of very subtantial assets which the petitioner claimed as the source of his expenditures. The government attempted to disprove—and the petitioner in his case attempted to prove—that the petitioner had been the beneficial owner of real property in Puerto Rico. There is no dispute that three quite substantial properties were sold in November of 1965 nor that the petitioner, represented by counsel, was the prime mover in the sale. There is no dispute that these were corporate properties nor that petitioner was not the record owner. But petitioner contended that the other participants in the sale were his nominees

whereas the government contended to the contrary, arguing that they, and petitioner as well, were nominees of one Raymond Marquez—an alleged "numbers operator" in New York.

Trial Abuses

The prosecution deliberately injected into the trial the "numbers operator" comment and references to "organized crime". Similarly, it elicited evidence that an attorney for petitioner had invoked the attorney-client privilege before a grand jury investigating petitioner. The case was finally submitted to the jury, over defense objection, on instructions which would permit a conviction predicated on either specific item or expenditures proof, that is, even if the jury disbelieved the narcotics trafficking allegations of the indictment. The prosecutor's final argument drew attention to the petitioner's failure to contradict Claude Pastou and his failure to present evidence of where cash was hidden, circumstances which the petitioner claimed impermissibly burdened his decision not to take the witness stand. During the course of deliberations the jury sent out several notes. One revealed that at least one juror held the opinion that the petitioner had not received a fair trial. In response the trial judge delivered a modified *Allen* charge which, among other things, instructed the jury that it had no function concerning any aspects of fairness. Another note revealed that the juror still held the opinion that the petitioner had not received a fair trial and also held the opinion that the evidence was insufficient to convict. The judge failed to notify counsel of this note and simply sent an instruction back to the jury that it must continue deliberating. Counsel were informed of these communications several hours after the fact.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted To Resolve the Conflict Among the District of Columbia, Third and Seventh Circuits on the One Hand and the First, Second, Fifth and Eighth Circuits on the Other Hand, Concerning Whether the Supplemental Charge Approved by This Court in Allen v. United States Should Be Banned and A.B.A. Trial by Jury Standard 5.4 Substituted in Its Stead

A trial problem arose in this case which the trial judge interpreted as requiring a supplementary instruction packing even more "dynamite," and less balance, than the original *Allen* charge as passed on by the Supreme Court in 1896. A note from the jury advised the Court as follows.

> "One juror in our group feels that the courtroom atmosphere in the entire court was hostile at all times to the defendant's cause of action; therefore we cannot really ever come to a unanimous conclusion since that juror feels a fair trial has not taken place here. Doesn't this mean we are impossibly locked and unable to give a verdict?"
> (Tr. 2164)

The Court sent the jurors home for the evening and heard defense counsel the following morning. Counsel urged at length that the juror's concern may well have involved legitimate aspects of factfinding (Tr. 2166-68). The Court then immediately called for the jury and instructed it at great length (App. 7a-13a).

In brief, the judge perceived the note as an attack on his own fairness, said, "the essence of the complaint is that a juror feels that the defendant, in the atmosphere in this courtroom, did not obtain a fair trial"

(Tr. 2169), and proceeded to charge the jury that fairness was none of their concern, that it was the function of the judge to attend to fairness, that the trial was fair, and that if it were not, the Court of Appeals sat to cure this error. Along this path the judge admonished repeatedly those jurors who would "invade" (App. 9a) the province of fairness that such would "corrupt their oaths" (App. 7a, 9a, 10a, 13a), indicated the desirability of reaching a verdict in this "important case" (App. 10a), emphasized the expense of the trial (App. 11a-12a), and the necessity of a disposition at some time, announced the "very object and purpose of the jury system . . . to secure unanimity" (App. 12a), suggested the need to change opinions (App. 12a), and to "yield judgments in further deliberations (App. 12a), and misquoted the charge in *Allen* v. *United States,* 164 U.S. 492, 501 (1896). On the subject of *Allen,* the judge also gave the Court's language from the Supreme Court's discussion—as distinguished from the charge being reviewed—belittling "blind" stubbornness (App. 13a). *See generally,* Note, *The Allen Charge Dilemma,* 10 Amer. Crim. L. Rev. 637, 667 & n. 113 (1972).

A. A number of severe criticisms can be mounted against this charge:

1. The great coercive pressure placed upon the "lone holdout" juror who had prompted the charge is manifest. Similar imputations that a juror was corrupting her oath led to reversal of the conviction in *Jackson* v. *United States,* — A.2d —, 20 Cr.L. 2437, # 10248, D.C. Ct. of Appeals, Feb. 2, 1977. Furthermore, although the trial court did not give a second *Allen* type charge in terms, its response to the jurors' subsequent deadlock

note that they should continue deliberating must have been perceived by all as a reaffirmation of the previous charge (Tr. 2192-94).

2. Mr. Chief Justice Burger, speaking as a Circuit Judge, has said it would be a "precarious undertaking" for a trial judge to give a supplemental charge knowing of a split among the jurors with a minority favoring acquittal. *Mullin* v. *United States,* 123 U.S. App. D.C. 29, 356 F.2d 368, 370 (1966). Yet, that is precisely what happened here.

3. The Judge in this case may well have misconceived what was troubling the juror. By taking a lawyer's view of what a "hostile" courtroom and a "fair trial" portend, he may have overlooked the lay understanding of these terms. In any event, the jury's proper function in factfinding cannot be pried apart in mechanical fashion from the judge's function in ruling on law. Notions of fairness permeate both roles.

4. The judge further undermined the jury by directing its attention to the existence of an appeals court and its remedial function. Such reference could only invite the jury to take its responsibilities less seriously and constitutes grounds for reversal. *United States* v. *Fiorito,* 300 F.2d 424, 427 (7th Cir. 1962); *see United States* v. *Greenberg,* 445 F.2d 1158, 11962 (2d Cir. 1971) (unobjected to reference to appeals court not reversible error, but "better procedure" to avoid such hazards).

5. The reliance of the court below on the fact of a subsequent request for testimony plainly does not show that the jury as an entity was deliberating in a responsible and conscientious fashion. We do not know which juror or jurors made the request or for what reasons.

B. More importantly, there are substantial reasons why the Supreme Court should hear this case:

1. The time has come for this Court to review the continuing viability and advisability of *Allen* v. *United States*, 164 U.S. 492 (1896). The charge found in that case not to be reversible error has become a standard deadlock-breaker as well as a springboard for numerous free-style ventures such as the one appearing herein. The commentators, however have identified great hazards in *Allen* and many courts have agreed. *See generally*, Note, *The Allen Charge Dilemma*, 10 Amer. Crim. L. Rev. 637 (1972); Note, *Due process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge*, 53 Va. L. Rev. 123 (1967); Comment, *Deadlocked Juries and Dynamite: A Critical Look at the Allen Charge*, 31 U. Chi. L. Rev. 386 (1964). Among the criticisms are the inherently coercive nature of the charge and the economic drawbacks in spawning innumerable appeals. Joining in the criticism are the American Bar Association, A.B.A. Project on Standards for Criminal Justice, *Standards Relating to Trial by Jury* § 5.4 (Approved Draft 1968) and the Judicial Conference of the United States, *Supplement to Report of the Committee on the Operation of the Jury System* 2 (1969). And, Mr. Chief Justice Burger, again speaking as a District of Columbia Court of Appeals Judge, has stated "that considerable work for this court would be eliminated if District Judges would consistently use a form of instructions plainly within *Allen*". *Fulwood* v. *United States*, 369 F.2d 960, 963 (D.C. Cir. 1966).

2. A direct conflict exists among the Circuits. *Allen* has been banned and the A.B.A. Standards substituted

in its stead in the District of Columbia, the Third, and the Seventh Circuits. *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971) (*en banc*); *United States* v. *Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969); *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970); *United States* v. *Silvern*, 484 F.2d 879 (7th Cir. 1973) (*en banc*). On the other hand, the First, Second, Fifth and Eighth Circuits have expressly refused to take this step. *United States* v. *Flannery*, 451 F.2d 880, 884 (1st Cir. 1971); *United States* v. *Angiulo*, 485 F.2d 37, 40 (1st Cir. 1973); *United States* v. *Hynes*, 424 F.2d 754 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970); *United States* v. *Martinez*, 446 F.2d 118 (2d Cir. 1971); *United States* v. *Bailey*, 480 F.2d 518 (5th Cir. 1973) (*en banc*); *United States* v. *Wicbold*, 507 F.2d 932 (8th Cir. 1974). Petitioner invited the court below to switch to the A.B.A. Standard, but it ignored the invitation. The prevailing attitude in the Second Circuit was plainly stated by Judge Feinberg in *United States* v. *Martinez, supra*, 446 F.2d at 119:

> We recognize that in recent years the traditional "Allen" charge has received criticism from both judges, see e. g., United States v. Sawyers, 423 F.2d 1335, 1344 (4th Cir. 1970) (dissenting opinion); Thaggard v. United States, 354 F.2d 735, 739 (5th Cir. 1965) (concurring opinion); Huffman v. United States, 297 F.2d 754, 755 (5th Cir. 1962) (opinion dissenting in part), and commentators, see e. g., 2 C. Wright, Federal Practice and Procedure (Criminal) § 502, at 360 (1969); Comment, On Instructing Deadlocked Juries, 78 Yale L.J. 100 (1968); Note, Due Process, Judicial Economy and the Hung Jury: A reexamination of the Allen Charge, 53 Va. L. Rev. 123 (1967), and that some jurisdictions forbid its use entirely see,

e. g., United States v. Thomas, [449 F.2d 1177,] 39 L.W. 2306 (D.C. Cir. Nov. 6, 1970); United States v. Fioravanti, 412 F.2d 407, 414-420 (3d Cir.), cert. denied *sub nom.*, Panaccione v. United States, 396 U.S. 837, 90 S. Ct. 97, 24 L. Ed. 2d 88 (1969); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959). Nevertheless, since we reexamined our position on use of the "Allen" charge little over a year ago, we do not think it is appropriate now to reconsider it. However, we note that, despite the distinguished criticism, our view that the "Allen" charge is not necessarily coercive is by no means unique. See, e.g., United States v. Sawyers, *supra*; United States v. Barnhill, 305 F.2d 164 (6th Cir.), cert. denied, 371 U.S. 865, 83 S. Ct. 126, 9 L. Ed. 2d 102 (1962).

Whether the *Allen* Charge is "necessarily coercive" or not, or whether it should be eliminated merely as a prophylactic measure, the question is one which deserves an answer and a uniform federal rule by the Supreme Court. Since unanimous 12 person juries are required in federal criminal cases, constitutional issues are clearly embroiled in the conflict. And, since this Court has supervisory power over lower federal courts, an answer can be rendered even if no constitutional violation is found in this case.

3. Further conflict exists among the Circuits (and among the States as well) concerning when, if ever, in what form and under what circumstances a trial court should give an *Allen* charge. *Compare*, United States v. *Flannery*, 451 F.2d 880 (1st Cir. 1971); *United States* v. *Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States* v. *Kenner*, 354 F.2d 780, 782-84 (2d Cir. 1965); *United States* v. *Rogers*, 289 F.2d 433 (4th Cir. 1961); *United States* v. *Harris*, 391 F.2d 348, 355 (6th Cir. 1968);

Chicago & E. I. Ry. v. *Sellars*, 5 F.2d 31 (8th Cir. 1925); *Walsh* v. *United States*, 371 F.2d 135 (9th Cir. 1967); *United States* v. *Wynn*, 415 F.2d 135 (10th Cir. 1969) *with United States* v. *Hynes*, 424 F.2d 754 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970); *United States* v. *Martinez*, 446 F.2d 118 (2d Cir. 1971); *and United States* v. *Sawyers*, 423 F.2d 1335, 1342-43 (4th Cir. 1970). *See generally, United States* v. *Bailey*, 468 F.2d 652, 667-68 (5th Cir. 1972), *aff'd.*, 480 F.2d 518 (5th Cir. 1973) (*en banc*). *Allen* v. *United States*, 164 U.S. 492 (1896) has not withstood the test of time. Indeed, it has become so eroded and so hedged about over the years that it serves now more as a source of confusion—and an enticement to error—than as a polestar for trial judges.

4. A final question remains. Apparently the lower federal courts have some doubt concerning their authority under the supervisory power to ban a jury instruction which this Court has once approved. Mr. Justice (then Circuit Judge) Stevens identified this "difficult question" in his concurring opinion in *United States* v. *Silvern*, 484 F.2d 879, 885, 886 (7th Cir. 1973) (*en banc*) in which he observed:

> I have not yet been able satisfactorily to explain to myself how this circuit can lawfully announce that an instruction to a jury which the Supreme Court has specifically and squarely held is not reversible error in federal criminal trials shall in the future constitute reversible error when given in such trials conducted in the Seventh Circuit. Possibly the answer is confidence that Supreme Court review of a decision such as this would lead to an overruling of *Allen*. That confidence may well be misplaced, cf. Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L Ed. 2d 152; even if

warranted, it does not provide a completely satisfactory answer to a difficult question.

And, Circuit Judge Coleman voted with the majority in *United States* v. *Bailey*, 480 F.2d 518, 519 (5th Cir. 1973) (*en banc*) only because he believed himself bound to this Court's decision in *Allen*.

If the lower courts have power to modify the rigors of *Allen*, they should be so advised. If they lack this authority, they also should be so advised. And, if the latter is true, it is a further reason for this Court to grant certiorari and review its 1896 precedent in *Allen*.

II.

The Decision Below Countenancing the Judge's Instruction to the Jury in the Absence of Petitioner and His Counsel Conflicts with Applicable Decisions of This Court on Important Recurring Questions of Federal Law Concerning the Proper Judicial Response to Questions from the Jury During Deliberations

Following the *Allen* episode of the previous point, the trial judge received another note from the jury describing the circumstances of its continued disagreement. Instead of (1) notifying the petitioner and (2) his counsel and (3) giving them the opportunity (4) to appear and (5) to respord, and then instead of (6) having the jury brought to the open courtroom (7) for whatever instructions it deemed appropriate in its informed discretion after hearing from the parties, and (8) after hearing timely exceptions, the Court simply sent in word to them that "I wanted them to continue in their deliberations" (Tr. 2193) and advised counsel of this several hours after the fact. This entire episode which violates a panoply of established

rights and controvenes all orderly trial procedure, appears succinctly in the transcript:

> "THE COURT: I have a note which I received from the jury while I was in the other case and the answer to which I indicated that I wanted them to continue to deliberate, but I will read the document.
>
> 'Your Honor, we, the members of the jury, were voting on the verdict since 2:30 yesterday when we had ten guilty, one undecided and one not guilty.'
>
> "I can't read that. There is one phrase I can't read, but something on something.
>
> "Maybe it means 'On a further ballot the undecided shifted to guilty and the same juror still votes not guilty. Apart from one juror feeling, first the evidence is insufficient for a verdict of guilty, this juror continues to feel that the trial was conducted in an atmostphere detrimental to the defendant's cause of action. Accordingly we feel no further deliberations would be fruitful.'
>
> "I sent in word to them that I wanted them to continue their deliberations after I received that note, and I am going to persist in that.
>
> "MR. KRIEGER: Would Your Honor indicate at about what time that note was sent in, please?
>
> "THE COURT: I thought I had indicated that. 3.45." (Tr. 2192-93)

This, we submit, is the antithesis of due process.

In *Shields* v. *United States*, 273 U.S. 583 (1927) a unanimous Supreme Court reversed the petitioner's conviction in a case where the jury sent a note communicating inability to agree as to some defendants and the judge on his own sent back a written reply telling the jury they would have to decide as to all defendants. *Shields* appears to be remarkable indistin-

guishable from the case at hand. And *Shields* is still good law.[1]

In *Rogers* v. *United States,* 422 U.S. 35 (1975) a unanimous Supreme Court, speaking through the Chief Justice, reversed the petitioner's conviction as plain error in a case where the jury sent a note inquiring whether the Court would accept a verdict of "Guilty as charged with extreme mercy of the court" and the judge on his own sent back instructions through the marshal that his answer was affirmative. *Shields* is prominently cited, quoted, and relied on in *Rogers.*

Herein the petitioner and his counsel were, among other things, deprived of the substantial right to address advocacy to the trial court's discretion before it acted on the problematical note. *See Fillippon* v. *Albion Vein Slate Co.,* 250 U.S. 76 (1919). Counsel may well have argued for declaration of a mistrial because of the jury's failure to agree. He could have argued for supplemental instructions or other measures, if he had been informed. And the instruction to keep deliberating may well have been perceived as a legal instruction reaffirming the trial court's disapproval of the lone holdout juror's concern over fairness. Thus, the court below did not successfully distinguish *Shields* and *Rogers.*

The court below also erred in relying upon the absence of an objection. Since the trial judge concluded "and I am going to persist in that", an objection would have been futile and discourteous. Moreover, the error qualifies as plain error.

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[1] Indeed, it is now buttressed by Rule 43 of the Federal Rules of Criminal Procedure.

Finally, the court below ignored the constitutional basis of the error, relying on Rule 43 only, and thus did not make the difficult finding that the error was harmless beyond a reasonable doubt.

The decision of the court below is in direct conflict with the controlling Supreme Court precedents cited. Furthermore, although the law governing communications with the jury should be clear, many federal trial judges appear to be unaware of it and in fact often proceed in what they regard as simple matters out of the presence of counsel. For other recent instances, see *United States* v. *Robinson,* 544 F.2d 611, 620-21 (2d Cir. 1976) (sealing of juror's note), *pet. for reh. en banc granted,* Feb. 17, 1977; *United States* v. *McDuffie,* 542 F.2d 236, 240-41 (5th Cir. 1976).

The attitude that allows trial judges to dispatch with deadlock notes without even advising counsel is an affront to the adversary system and should be repudiated by this Court. Moreover, the concept that such a departure from basic trial guarantees can be forgiven under a "harmless error" rule provides a further ground for granting the writ.

III.

The Decision Below Conflicts in Principle with Decisions of This Court Forbidding the Prosecution from Commenting Upon a Criminal Defendant's Decision Not To Testify in His Own Behalf

It has long been the law in federal courts that remarks about the defendant's failure to take the stand constitute reversible error. 18 U.S.C. § 3481; *Wilson* v. *United States,* 149 U.S. 60 (1893). Such statements infringe upon the defendant's presumption of innocence and violate his Fifth Amendment right against self-incrimination by converting silence to evidence of

guilt. *Griffin* v. *California*, 380 U.S. 609 (1965). The test for determining whether a statement before a jury by the judge or prosecutor was an improper comment upon a defendant's failure to testify has been defined as whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. *United States* v. *Williams*, 503 F.2d 480, 485 (2d Cir. 1974); *Haberstroh* v. *Montanye*, 493 F.2d 483 (2d Cir. 1974) (per curiam). Direct and indirect references by a prosecutor to an accused's decision not to testify and to rely on the presumption of innocence have on more than one occassion contributed to reversal of a conviction. *See, e.g., Griffin* v. *California, supra; Kelly* v. *Stone*, 514 F.2d 18 (9th Cir. 1975) (per curiam); *United States* v. *Smith*, 500 F.2d 293 (6th Cir. 1974); *United States* v. *Flannery*, 451 F.2d 880 (1st Cir. 1971); *Rodriguez-Sandoval* v. *United States*, 409 F.2d 529 (1st Cir. 1969); *United States* v. *Davis*, 357 F.2d 438 (5th Cir. 1966); *Carlin* v. *United States*, 351 F.2d 618 (5th Cir. 1965); *Desmond* v. *United States*, 345 F.2d 225 (1st Cir. 1965); *Barnes* v. *United States*, 8 F.2d 832 (8th Cir. 1925).

In the case at bar, defendant finally chose not to testify; rather, he relied on his Fifth Amendment right to remain silent, on the prosecution's burden of proof imposed by our Constitution, and on the presumption that an accused is innocent until proven guilty beyond a reasonable doubt. Nonetheless, during his final argument, the prosecutor clearly implied that the jury should consider the defendant's failure to testify in determining defendant's guilt or innocence (Tr. 2007-08; 2079-81).

The conclusion of the court below that a jury would not get the prosecution's intended message defies the facts and indicates conflict with the spirit of this Court's decisions in *Griffin* v. *California*, 380 U.S. 609 (1969) and *Wilson* v. *United States*, 149 U.S. 60 (1893). Certiorari should be granted.

IV.

The Prosecution's Deliberate Elicitation of the Fact That an Attorney for Petitioner Had Invoked Petitioner's Attorney-Client Privilege Before an Investigating Grand Jury Constitutes Error in Legal Conflict with the Third Circuit and in Derogation of this Court's Decisions Concerning the Fifth Amendment Privilege Against Self-Incrimination

The prosecutor deliberately and unjustifiably drew attention, over objection, to the fact that Mr. Irwin Zemen, the attorney who had represented the petitioner during the crucial property transactions of November 1965, invoked the petitioner's attorney-client privilege when he appeared before a grand jury in Puerto Rico (Tr. 1533-34; see also 1526). Petitioner's motions for a mistrial were denied (Tr. 1534; 1643-45).

Specifically, in cross-examining Mr. Zemen the prosecutor confronted him with grand jury testimony in which he declined to disclose any of the investors in the Madrid Hotel Corporation (Tr. 1533-34). The propriety of Mr. Zemen's invocation of the attorney-client privilege has never been challenged. Moreover, that assertion of privilege was not the least inconsistent, factually or legally, with anything Mr. Zemen had said at trial. *See United States* v. *Hale*, 422 U.S. 171 (1975); *Grunewald* v. *United States*, 353 U.S. 391 (1957). The preceding grand jury testimony read by the prosecutor was arguably proper impeachment. But the final question and answer read related to the pe-

titioner's privilege and only served the purpose of inviting the jury's attention to a circumstance which undoubtedly was viewed adversely by some of the jurors. Again, the petitioner's silence was emphasized.

The court below failed even to address this infringement of the petitioner's rights. But the result seems at war with the spirit of the Supreme Court's recent Fifth Amendment decision in *Doyle* v. *Ohio*, 96 S.Ct. 2240 (1976) and in legal conflict with the Third Circuit's Sixth Amendment right to counsel decision in *United States ex rel. Macon* v. *Yeager*, 476 F.2d 613 (3d Cir. 1973). If the prosecution is free to draw adverse inferences from invocation of the attorney-client privilege, then the right to counsel as well as the privilege itself have been greatly burdened.

V.

This Court Should Resolve the Important and Continuing Conflict Between the Second Circuit and the Other Circuits Which Allowed the Prosecution To Elicit Evidence of Supposed Criminal Associations Having No Probative Value but Packing Great Prejudicial Effect and the Court Below To Affirm Without Discussion

The prosecutor also planted a seed of explanation for the petitioner's silence.

First, in his direct examination of Revenue Agent Davidson the prosecutor deliberately elicited that the agent was assigned to an "Organized Strike Force" (Tr. 1243), that he had training in "Strike Force" fraud courses and that this meant investigation of tax returns of alleged members of organized crime. The Court failed to grant a mistrial or strike the testimony but it did tell the jurors that the testimony was not to influence the deliberations (Tr. 1243-47).

Then, in cross-examining a Mr. Adorno, the prosecutor asked about a man, Raymond Marquez, whom the prosecutor intended to argue was closely associated with the petitioner: "Mr. Marquez is in the business of running the numbers game, is he not?" (Tr. 1832). The petitioner's motion for a mistrial was denied (Tr. 1833). Similarly, the prosecutor again inserted the issue of guilt by association when during rebuttal he repeated the identification of Marquez as a "numbers operator." This occurred in a context in which (a) no one had challenged who Marquez was, (b) his occupation was irrelevant, (c) the prosecutor had just assured the judge that the answer he wanted would be relevant to a proper inquiry, (d) defense counsel objected beforehand, (e) the witness was an FBI agent, and (f) the answer was an alleged admission of the petitioner himself. Petitioner's motions for a mistrial were denied (Tr. 1907-7-8; 1994-95). And, thereafter the prosecution flaunted Raymond Marquez in argument to the jury (Tr. 2013, 2018, 2020-21, 2022, 2024; see also 2072, 2073, 2076-77, 2080-81) thus forcing defense counsel also to struggle with this problem (Tr. 2038, 2041).

Irrelevant and highly prejudicial testimony hinting the petitioner's involvement in organized crime and numbers operation had no business in this case. Rules 404(b) and 403, Rules of Evidence for United States Courts and Magistrates. Casting petitioner as the real estate nominee of Marquez was perhaps permissible advocacy; casting him as a partner in crime was not. Here, the association with numbers operations not only impermissibly puts the petitioner's character in issue before the jury but also conjures poisonous specula-

tion that he may have received unreported taxable income in 1967 from a gambling enterprise.

In short, the prosecution committed reversible error by its persistent efforts which deprived petitioner of his rightful cloak of innocence and instead tarred him in a presumption of criminality. *Cf., Estelle* v. *Williams,* 425 U.S. ——, 19 Cr. L. 3061, May 3, 1976.

In other Circuits such evidence of other crimes, wrongs, or acts would never have been admitted. *E.g., Fish* v. *United States,* 215 F. 544 (1st Cir. 1914); *Lovely* v. *United States,* 169 F.2d 386 (4th Cir. 1948); *United States* v. *Cox,* 536 F.2d 65 (5th Cir. 1976); *United States* v. *Goodwin,* 492 F.2d 1141 (5th Cir. 1974); *Stansbury* v. *United States,* 219 F.2d 165 (5th Cir. 1955); *United States* v. *Ring,* 513 F.2d 1001 (6th Cir. 1975); *United States* v *Machen,* 430 F.2d 523 (7th Cir. 1970); *United States* v. *Accardo,* 298 F.2d 133, 136-38, 140-41 (7th Cir. 1962); *United States* v. *Knight,* 535 F.2d 1059 (8th Cir. 1976); *United States* v. *Crawford,* 438 F.2d 441 (8th Cir. 1971); *DeVore* v. *United States,* 368 F.2d 396 (9th Cir. 1966); *United States* v. *Burkhart,* 458 F.2d 201 (10th Cir. 1972) (*en banc*). But in the Second Circuit the so-called "inclusionary rule" has prevailed. *E.g., United States* v. *Papadakis,* 510 F.2d 287, 294 (2d Cir.), *cert. denied,* 421 U.S. 950 (1975). *See also, Bradley* v. *United States,* 140 U.S. App.D.C. 7, 433 F.2d 1113, 1118 n. 18 (1969) (court refrains from choosing between the inclusionary and exclusionary rule). This conflict remains even after passage of the Rules of Evidence for United States Courts and Magistrates. Under the inclusionary rule, anything comes into evidence which the trial court views as having any relevance to the case—even though it imports problems of "other crimes, wrongs

or acts" into the trial. These are excluded, if at all, on grounds only of substantially overweighing prejudice, confusion, or waste of time—just like any other evidence under Rule 403. And, as a practical matter, "other crimes" evidence is admitted so readily in the Second Circuit that the court below did not bother to discuss the issue in this case. This great conflict in principle between the Circuits should be resolved.

The net effect of the prosecution's veiled comment upon the petitioner's decision not to testify, its bringing into evidence Mr. Zemen's invocation of the attorney-client privilege on petitioner's behalf, and its unwarranted injection of "other crimes" evidence was to destroy the presumption of innocence in this close and hotly-disputed case.

VI.

The Decision Below Allowing the Trial Court To Amend the Language of the Indictment Used To Charge an Element of the Crime on the Theory that the Details Are Surplusage Conflicts Directly with This Court's Decision in Stirone v. United States

A two-count indictment was founded against petitioner on April 14, 1974, charging him, in Count I with attempting to evade income taxes for the year 1967 in violation of 26 U.S.C. § 7201 by omitting in his 1967 tax return income received "from the purchase and sale of heroin," and, similarly, in Count II, with submitting a false income tax return for the year 1967 in violation of 26 U.S.C. § 7206(1) by failing to report "additional income derived from another business, to wit, trafficking in heroin . . . ." Despite the singularity of the Grand Jury finding of narcotics trafficking income, the trial was permitted to proceed to verdict on expenditures method proof as well as a specific item

proof and, significantly, the petit jury was instructed that it could return a finding of guilty even though it may have believed that petitioner received no income from drug trafficking (Tr. 2145-61). That is, the Grand Jury made specific and relevant allegations that one particular kind of income had been concealed. The prosecution attempted to prove the specific item allegation by Claude Pastou's testimony and to corroborate this charge circumstantially by expenditures method proof. *See generally,* Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid,* 76 Yale L.J. 1, 13, 15 (1966). No complaint is lodged against this procedure. But the trial jury was finally instructed that it could ignore the heroin dealing allegations and convict without finding that the petitioner made his income from any particular source.

Throughout the trial petitioner urged that a verdict could not properly be predicated on charges extending beyond the grounds of the indictment. He submitted jury instructions to this effect (Requests Nos. 7 and 8), which were denied. But the issue came to a precise head when the jury requested a specific instruction,

> "Please, may we have an answer to: Is it sufficient evidence of guilt that the defendant spent moneys [sic] in 1967 in excess of reported income regardless of the source of that income, presuming his net worth was as stated in the 1966 statement of net worth, or did that income have to come from the heroin trafficking?", (Tr. 2158-59; 2145),

and the Court over objection (Tr. 2160-61) answered, in essence, yes, it is sufficient evidence of guilt that

petitioner spent money in excess of reported income without regard to particular source and, no "in order to convict the defendant under the expenditures method you need not find that he made his income from any particular source" (Tr. 2059-60).

Petitioner contends that the Court effectively amended the indictment and permitted the petit jury to rest conviction on charges never made against him by any Grand Jury in violation of *Stirone* v. *United States,* 361 U.S. 212 (1960). The prosecution contends, and the court below agreed, that there was no violation of the Supreme Court's unanimous decision in *Stirone,* that the Grand Jury's findings of heroin trafficking income were mere surplusage which could properly be read out of the indictment.

Stirone v. *United States,* 361 U.S. 212 (1960) was a Hobbs Act prosecution for interfering with interstate commerce by extortion. The indictment charged that the defendant used his influential union position to obstruct, delay and affect interstate commerce by extortion of money from the owner of a ready-mix concrete plant induced by fear and threats of labor disputes and of interference with the victim's contract to supply ready-mix concrete from his plant to be used for the erection of a steel-processing plant. In pleading the essential element of interstate commerce the Grand Jury not only alleged in general terms but also made the limited and specific finding that the steel plant contract caused sand to be moved in interstate commerce to the concrete plant. But the trial court charged the petit jury with two theories concerning the interstate commerce element, namely, that the defendant's guilt could be rested either on a finding (1) that sand used to make the concrete had been shipped

into the concrete plant from out of state or (2) that the concrete was used for constructing a mill which would manufacture articles of steel to be shipped out of state. Thus the petit jury could return a verdict of guilty even though it believed no shipments of sand were proven, contrary to what the Grand Jury had in mind.

In other words, when the Grand Jury charges an element of the crime which cannot be treated as surplusage its description cannot be amended freehand. 361 U.S. at 218-19.

The same error inheres in the instant prosecution. In pleading the essential element of concealed taxable income the Grand Jury not only alleged in general terms but also made the limited and specific finding that petitioner had received the income from the purchase and sale of heroin. But the trial court charged the petit jury with two distinct theories concerning the concealed taxable income one of which would permit a guilty verdict rested on a finding contrary to a belief that heroin transactions were proven as the Grand Jury specified.

Indeed, the trial jury's note in the instant case suggests that it may have rejected out of hand Claude Pastou's testimony of trafficking in drugs with petitioner. For all we know, it may have had in mind entirely different sources of income, such as mortgage payments received in 1967 (Tr. 129-130; 190-92; 196-197) or even such dark unproven sources improperly interjected by the prosecutor as the numbers game run by Raymond Marquez (Tr. 1832) or "organized crime" generally (Tr. 1243-47). After all, the trial court did not require any "particular source" to be proved.

For purposes of logic, the danger of bypassing the Grand Jury's specification, *see generally, Russell* v. *United States*, 369 U.S. 749 (1962), may be viewed as follows: The heroin in the instant case is to the mortgage payments (and so forth) as the sand in *Stirone* was to the steel. In each case the indictment was effectively amended to permit a conviction to rest outside the Grand Jury's charge; accordingly, on the strength of *Stirone* petitioner's conviction should have been reversed. The preservation of the Fifth Amendment safeguard of a Grand Jury indictment process requires no less.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 1317—September Term, 1975.

(Argued August 17, 1976 Decided November 30, 1976.)

Docket No. 76-1188

UNITED STATES OF AMERICA, *Appellee,*

v.

BENJAMIN RODRIGUEZ, *Defendant-Appellant.*

Before:

VAN GRAAFEILAND, *Circuit Judge,* KELLEHER * and GAGLIARDI,** *District Judges.*

Appeal from judgment of conviction after jury trial before Hon. Robert L. Carter in the United States District Court for the Southern District of New York, on one count of attempted income tax evasion, 26 U.S.C. § 7201, and one count of filing a materially false income tax return, 26 U.S.C. § 7206(1).

Affirmed.

ALBERT J. KRIEGER, New York, N.Y., and JOSEPH BEELER, Miami, Florida, *for Defendant-Appellant Rodriguez.*

JOHN N. BUSH, Assistant U.S. Attorney (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York; Audrey Strauss, Assistant U.S. Attorney, Of Counsel), *for Appellee.*

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* Of the Central District of California, sitting by designation.

** Of the Southern District of New York, sitting by designation.

GAGLIARDI, *District Judge:*

On April 16, 1974 a two count indictment was filed charging Benjamin Rodriguez with attempting to evade payment of income tax for the year 1967, 26 U.S.C. § 7201, and with filing a materially false income tax return for the same year, 26 U.S.C. § 7206(1). After a twelve day jury trial in the United States District Court for the Southern District of New York before Robert L. Carter, *J.*, Rodriguez was found guilty on both counts. He now urges reversal on several grounds, the most serious of which is his contention that the trial judge committed reversible error when, in response to a deadlock note sent by the jury, he sent instructions to it to continue deliberations without notifying counsel of the note and his response thereto. We turn first to this claim and the circumstances surrounding it.

At 3:45 P.M. on March 2, after the jury had been deliberating for one and one half days, Judge Carter received a note from the jury which indicated that the jurors felt they were unable to reach a unanimous verdict. Without informing counsel of the receipt of this note or its contents, Judge Carter sent a message to the jury instructing it to continue deliberating.[1] Two hours later the jury requested that the testimony of a crucial government witness be read. Judge Carter summoned counsel, the note was discussed, the relevant testimony was identified and read to the jury, and the jury retired. The judge then notified counsel for the first time that he had received the deadlock note two hours earlier. He informed counsel that he had instructed the jury to continue deliberating and that he was still of the opinion that continued deliberations were appropriate. Counsel for the defendant made no objection upon learning of Judge Carter's disposition

[1] Judge Carter was at that time conducting a hearing on an application for a preliminary injunction in another matter.

of the earlier note. One hour after this colloquy the jury returned with its verdict of guilty. Rodriguez now contends that the District Court committed reversible error when it responded to the jury's deadlock note without first notifying counsel of it and soliciting their statements. We reject his contention.

Although we recognize that the preferred course is for the District Court to notify counsel of all communications from the jury, Rule 43, Fed. R. Crim. P., and we hold that the course followed here was erroneous, we find no plain error warranting reversal of the conviction. We hold instead that the error was harmless, for it did not prejudice the defendant, and may therefore be disregarded. Fed. R. Crim. P. 52(a). *See United States* v. *Reynolds*, 489 F.2d 4, 7-8 (6th Cir. 1973), *cert. denied*, 416 U.S. 988 (1974); *United States* v. *Arriagada*, 451 F.2d 487, 488 (4th Cir. 1971), *cert. denied*, 405 U.S. 1018 (1972). *Cf. United States* v. *Schor*, 418 F.2d 26, 30 (2d Cir. 1969); *United States* v. *Crutcher*, 405 F.2d 239, 244 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969); *United States* v. *Compagna*, 146 F.2d 524, 528 (2d Cir. 1944), *cert. denied*, 324 U.S. 867 (1945).

Rule 43, *supra*, "guarantees to a defendant in a criminal trial the right to be present 'at every stage of the trial . . .'." *Rogers* v. *United States*, 422 U.S. 35, 39 (1975). Here, however, we find that the note from Judge Carter to the jury, directing it to continue deliberating, produced no "reasonable possibility of prejudice" to the defendant although sent without prior notice to counsel. *United States* v. *Reynolds*, *supra* at 8. *See United States* v. *Toliver*, Dkt. Nos. 76-1130, 76-1136, 76-1202 (2d Cir. September 2, 1976), slip opin. 5321, 5332, quoting *Walker* v. *United States*, 322 F.2d 434, 436 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 976 (1964). *See* 3 Wright, Federal Practice and Procedure § 724, at 203 (1969).

Counsel were informed of the communication to the jury two hours after it had been given, and any objection to

the continuation of jury deliberations could have been taken effectively at that time. The intervening request for the testimony of a key witness indicated that the jury had received the court's instruction to continue in a responsive manner and was deliberating in a responsible and conscientious fashion. The jury did not request and Judge Carter did not give legal instructions in the absence of defendant and defense counsel. Nor did the Judge comment on the form or acceptability of the verdict in response to a jury inquiry. These factual circumstances distinguish the case before us from *Rogers* v. *United States, supra,* and *Shields* v. *United States,* 273 U.S. 583 (1927). Accordingly, upon a consideration of the non-prejudicial nature of the court's communication to the jury and the absence of objection, we find no plain error requiring reversal.

We turn now to appellant's other claims of error, which may be disposed of in more summary fashion. He argues that the District Court erred in instructing the jury that it could probably reach a guilty verdict without finding that the source of his unreported income was the purchase and sale of heroin, as averred in the indictment which charged him with attempted income tax evasion. Appellant contends that such instructions effectively amended the indictment and violated the rule against prejudicial variance enunciated in *Stirone* v. *United States,* 361 U.S. 212 (1960). We disagree. The essential elements of the violation charged were the realization of substantial unreported income by the defendant and the wilful and knowing attempt to evade payment of the income tax due. *Sansone* v. *United States,* 380 U.S. 343 (1965). To establish these elements the government introduced evidence under both the specific items and the expenditures method of proof. From the totality of the evidence the jury could reasonably and properly have inferred the existence of the essential elements without finding beyond a reasonable doubt that the specific source of the income was heroin transactions. *United States*

v. *Massei,* 355 U.S. 595 (1958). The averment in the indictment of this source may be treated as surplusage; since it is not essential to the proof of the violation charged, the jury may be instructed to disregard it. *United States* v. *Cirami,* 510 F.2d 69 (2d Cir.), *cert. denied,* 421 U.S. 964 (1975); *United States* v. *Colasurado,* 453 F.2d 585, 590-591 (2d Cir. 1971), *cert. denied,* 406 U.S. 917 (1972); *see United States* v. *Rosenblum,* 176 F.2d 321, 323-324 (7th Cir.), *cert. denied,* 338 U.S. 893 (1949).

We also find appellant's attack on the supplemental charge delivered by Judge Carter to be unpersuasive. At the close of the first day of deliberations, the jury sent Judge Carter a note which stated that one juror felt that the defendant had not received a fair trial and asked if this meant that it would be unable to return a verdict. Judge Carter sent the jury home for the evening and the next morning gave supplementary instructions emphasizing the jury's duty to find the facts based on the evidence presented. In addition, Judge Carter gave a modified *Allen* charge.

This Court has regularly upheld such a modified *Allen* charge. *See e.g., United States* v. *Bermudez,* 526 F.2d 89, 99-100 (2d Cir. 1975); *United States* v. *Tyers,* 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied,* 416 U.S. 971 (1974); *United States* v. *Birrell,* 447 F.2d 1168, 1173 (2d Cir. 1971), *cert. denied,* 404 U.S. 1025 (1972). We find nothing in the charge in this case which exceeds the permissible encouragement of the jurors to pursue their deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial. The jury was neither coerced nor directed toward any verdict. *Bermudez, supra* at 100. In his supplementary instructions Judge Carter responsibly and properly dealt with the concern voiced by one juror concerning the fairness of the trial by correctly delineating the respective responsibilities of the court and the jury. In these circumstances the District Court's reference to the review-

ing responsibility of the Court of Appeals over its conclusions of law neither coerced the jury in its determination of the facts nor undermined the seriousness and conscientiousness with which it undertook them. *See, e.g., United States* v. *Marchese,* 438 F.2d 452, 455 (2d Cir. 1971), *cert. denied,* 402 U.S. 1012 (1971).

Finally, we find no merit in the claim that the prosecutor improperly called the jury's attention to defendant's decision not to testify in his own behalf. *Cf. Griffin* v. *California,* 380 U.S. 609 (1965). We have repeatedly held that the prosecutor may comment upon the defense's failure to contradict the government's case. *United States ex rel. Leak* v. *Follette,* 418 F.2d 1266, 1268-1270 (2d Cir. 1969), *cert. denied,* 397 U.S. 1050 (1970). This is particularly proper where contradictory testimony was potentially available from witnesses other than the defendant himself. *United States* v. *Lipton,* 467 F.2d 1161 (2d Cir. 1972), *cert. denied,* 410 U.S. 927 (1973); *United States* v. *Deutsch,* 451 F.2d 98, 117 (2d Cir. 1971), *cert. denied,* 404 U.S. 1019 (1972). The remarks of the prosecutor in this case were not of such character that a jury would naturally and necessarily take them as comment on the failure of the defendant to testify, and therefore were not unfairly prejudicial. *United States ex rel. Leak* v. *Follette, supra.*

We have considered appellant's other assignments of error and find them to be without merit. For the foregoing reasons, we affirm the judgment of conviction.

SUPPLEMENTAL CHARGE TO THE JURY

(Transcript of March 2, 1976, pp. 2169-78)

[2169] (Jury present.)

The Court: Good morning, ladies and gentlemen.

I sent you home last night and deferred until today to respond to your note because you had had a full day yesterday and I wanted all of you to be rested and clearheaded so that you could absorb fully my comments.

Now, each of you took an oath when you sat down in that jury box to truly try this case, based on the evidence and on the law as I gave it to you and stated it to you.

Each of you took the oath that you did not sit in that jury box with some hidden, unrevealed personal agenda which you would attempt to pursue.

Now, your obligation and responsibility as jurors is to decide the facts, based on the evidence, solely on the evidence you heard in this courtroom, and on the law as I state it to you.

If you fail or refuse to do that, you have corrupted your oath and the legal process, and you cannot escape that result, let me suggest to you, by throwing the responsibility on someone else's shoulders.

Now, as I understand, the essence of the complaint is that a juror feels that the defendant, in the atmosphere in this courtroom, did not obtain a fair trial.

[2170] In the courtroom and in court trials there is a ritual and each of us in this ritual has a function, counsel, the Court and the jury.

A trial is an adversary proceeding, and counsel are engaged in a contest of skills, and at times that contest becomes heated. It has occurred; you have noticed that at some point in this trial.

The function of the court is, one, to maintain order and to be sure that the trial process proceeds in an atmosphere where there can be a rational and fair trial.

In the first instance, the ultimate responsibility of the Court is to insure that there is a fair trial. That is not the responsibility of the jury. The jury's responsibility is to decide the facts based on the evidence.

My function is not to invade your responsibility and to decide the facts for you. That is your job. But my job is to insure in the first instance that this trial proceeded in accordance with the rules of law in respect to fairness.

In doing that, ladies and gentlemen, I have to rule on various motions. I have to rule on objections. I have to make rulings as I understand the law to be.

I believe that in the course of this trial [2171] there have been a number of times when motions for a mistrial were made, and I have in every instance overruled those motions because I am convinced that as a matter of law there was no unfairness in this trial.

You have no more right as a juror to overrule and oversee me in that regard than I have to oversee your finding of the facts. That is what the legal process is for. That is what it is all about.

I am here to attempt to interpret the law as I understand it, and if an atmosphere in this courtroom has been created so there is unfairness to a defendant in a case before me, and if the jurors follows its function and applies the law to the facts that defines it and comes back with a verdict of acquittal, then at that point the defendant obviously, even though he has been affected by it hasn't been adversely affected.

On the other hand, if the jury comes back and applies the law to the facts and comes back with a conviction, if the atmosphere is such that there was unfairness, the case

isn't over. That is what Appellate Courts are for. The Appellate Courts are here to supervise and to oversee me, the Court, and to be certain that errors of law do not creep in, and therefore no one is unduly and unfairly punished because the judge, either by personal [2172] prejudices or by whatever way, has made errors in the law.

But again, that is not the function of the jury. That is the function of the Appellate Court in the event that the facts and the application of the facts lead to a conviction. If it doesn't, then that is something else. Then we are through with it. But if it leads to a conviction, then the case isn't over. The Appellate Courts are there to look at this case and to oversee it and to make rulings in regard to it, in regard to the fact whether or not there were errors in the law.

We have to make certain that we all understand what our oath is and what our function is in this process. It is quite possible that as a Federal judge in the Federal Court that I could comment on the evidence and I could indicate to you—and it would be within the rules—as to each one of these witnesses, by virtue of my commenting on the evidence, I could give you some indication of how I felt about the facts. But I never do that and don't propose to do that because even though I am allowed to do it, it would be invading your function.

Now, what I want you to do is that you stick to your function, you follow your oath, you fulfil [sic] your responsibility, and don't you invade my responsibility or my function or the Court's function.

[2173] I applaud the concern of the juror or jurors who are concerned that our courts function and operate in a way that there be fairness in the trial, but I want to assure you that the way to do that and to insure fairness is not for you to violate your oath. Even assuming that you are correct, that somehow the Court didn't fulfil its function in regard to the supervision of this trial, the old saying is

that two wrongs can't make a right; you can't correct it by corrupting your oath. Your responsibility is not to violate your oath.

Now, let me say one more thing, then I will move on.

We all have a purpose, and the jurors have a purpose, and the jurors are picked as lay people because their role is to concern themselves solely with the facts and to take the law as the Court gives it to them. Counsel and the Court have had a lifetime of training in the law. None of you sitting there can make any rational decision as to whether or not a judgment or a motion or a ruling of the Court on a matter of law was correct or not because you are uninformed. You don't know what that is. Many of you are in some profession of some kind, but I am not a trained doctor or an engineer or an architect so that I would be able to therefore tell you, those of you who [2174] are in that field, what your business is. I have to accept the fact that you know what your business is, and you are going to have to do that insofar as the Court is concerned.

I am going to suggest that you continue your deliberations, and I am going to suggest, as I indicated to you before, the purpose of jury deliberations is to talk things out.

When you first sat down I said to you I wanted you to listen to all the evidence and to keep an open mind and that you are to be hardheaded and make a hardheaded analysis of the facts without favor or prejudice, but based on your view of what the facts require, based upon the instructions that I have given you.

Now, the case is an important case, as I told you before, both to the Government and to the defense, and it is desirable that if a verdict can be reached that it be done, and that is so both from the point of view of the defendant and from the point of view of the Government.

As I understand this note—I can't read between the lines of the note, but as I understand this note—maybe I have misjudged it—the import of the note, as I received it, is that the juror has reached a conclusion that he or she cannot exchange views or deliberate about the [2175] facts and will not reach any conclusion about the facts for the reasons I have stated, and they are not, let me suggest, sound reasons.

Your final vote must reflect your conscientious decision as to how the issues are to be decided. But that conscientious decision must be based upon the evidence in this courtroom and upon the law as I stated it to you. If you follow that process and apply it, then obviously you are not to yield your convictions simply because you happen to be outnumbered and outweighed.

This trial, as I told you yesterday, took some 12 days. It was spread out over a period of four weeks. The fact issues have been sharply delineated. The trial has been expensive, and if you should fail to agree on a verdict, the case is left open and undecided, and like all cases it must be disposed of at some time, and there appears to be absolutely no reason to believe that another trial would not be equally expensive, nor does there appear to be any reason to believe that the case can be tried again more expertly or more exhaustively or more earnestly than it has been on either side.

Any future jury must be selected in the same manner as you were and must be chosen from the source that you were chosen from, so there doesn't appear to be any [2176] reason to believe that the case would ever be submitted to 12 jurors who are more intelligent, more impartial or more competent to decide this case or that more or clearer evidence could be produced on behalf of either side.

A trial of a case represents enormous energy, but that energy has gone primarily into an expenditure before the trial. A trial is like surgery. The patient has been treated

with deep therapy by the application of drugs and all kinds of remedies short of surgery itself, and surgery may take a couple of hours, but does that make it less important in the whole process? Of course not .

This case has taken 12 days, but there has been a great deal of time and effort before this case came into this courtroom that was expended by lawyers, by lawyers for the Government and for the defense before we even reached this point.

Now, while undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room.

The very object and purpose of the jury system is to secure unanimity by comparison of views and by argument among the jurors themselves.

It is normal, perfectly normal, absolutely [2177] normal for the jurors to have differences, and frequently jurors, after extended discussion, may find that a point of view which originally represented a fair and considered judgment might well yield upon the basis of argument and upon the basis of further discussions and a further view of the facts and the evidence.

Now, frequently further consideration may indicate that a change of original attitude is fully justified upon the law and the facts.

Now listen to what the Supreme Court of the United States has said on this and I am now quoting:

> "Although the verdict must be the verdict of each individual juror, they should listen with a disposition to be convinced by each other's argument, that if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of

> some men equally honest, equally intelligent as himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of the judgment which was not concurred in by the majority."

Now, it cannot be that each juror should go [2178] into the jury room with a blind determination that the verdict shall represent his or her opinion of the case at the particular time or that he should close his ears to the argument of men and women who are equally honest and intelligent as himself or herself and who bear the same responsibility, serve under the same sanction of the same oath and heard the same evidence with, we may assume, the same attention and with an equal desire to arrive at a fair and honest determination.

Now remember that at all times no juror is expected to yield a conscientious conviction that she or he may have as to the weight or effect of the evidence, but remember also that after full deliberation and a consideration of all the evidence it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience.

Now, consequently, I am going to ask you to retire to the jury room and to continue your deliberations. Carefully reexamine and reconsider all the evidence bearing upon the questions before you. And that consideration, ladies and gentlemen, is to be limited, as your oath bound you to, to an evaluation of the evidence and a determination of the facts based upon the law as I have stated it to you.

All right, thank you.

AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY, § 5.4 (APPROVED DRAFT 1968)

5.4 Length of deliberations; deadlocked jury.

(a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:

(i) that in order to return a verdict, each juror must agree thereto;

(ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.